(1) 89-985

No. -

In the
Supreme Court of the United States

OCTOBER TERM, 1989

JUSTO ENRIQUE JAY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Questions Presented for Review.

I. Whether the grand jury clause of the Fifth Amendment to the United States Constitution requires an indictment alleging a violation of 21 U.S.C. § 848 to specify the predicate violations which the grand jury found to comprise the "continuing series" of offenses charged.

II. Whether a criminal defendant's federal constitutional right to a unanimous verdict requires that the jury be instructed that their verdict must be unanimous as to the three offenses comprising the "continuing series" element of the continuing criminal enterprise offense.

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JUSTO ENRIQUE JAY,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Petitioner Justo Enrique Jay prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on September 21, 1989.

Opinions Below.

Petitioner's appeal from his conviction was heard by a panel of the Fourth Circuit which affirmed his conviction on September 21, 1989, in an unpublished *per curiam* opinion, which

is reproduced in the Appendix hereto at 1a. On October 19, 1989, the Court denied Jay's Petition for Rehearing and Suggestion for Rehearing In Banc. Appendix at 10a.

Jurisdiction.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 21, 1989. A timely petition for rehearing was denied on October 19, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 848 provides, in pertinent part:

> (b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Statement of the Case.

On February 2, 1988, a grand jury in the Western District of North Carolina returned Indictment No. 88-20, charging petitioner Jay with engaging in a continuing criminal enterprise (hereinafter "CCE") from 1978 to 1984, in violation of 21 U.S.C. § 848. The entirety of this one-count CCE indictment read as follows:

> THE GRAND JURY CHARGES:
>
> COUNT ONE
>
> That from in or about the fall of 1978 and continuing thereafter up to and including the fall of 1984, in the Western District of North Carolina, and elsewhere, the defendant,
>
> JUSTO ENRIQUE JAY
>
> knowingly, wilfully and intentionally did engage in a continuing criminal enterprise, in that he violated Title 21, United States Code, Section 841, 846, 952 and 963 by doing, causing, facilitating, and aiding and abetting the importation, possession with intent to distribute, and distribution of cocaine, a Schedule II narcotic controlled substance, and which violations were a part of a continuing series of violations undertaken by defendant, JUSTO ENRIQUE JAY, in concert with at least five other persons with respect to whom defendant, JUSTO ENRIQUE JAY, occupied a position of organizer, a supervisory position, and position of management, and from which defendant, JUSTO ENRIQUE JAY, obtained substantial income and resources in violation of Title 21, United States Code, Section 848.

Subsequently, on March 9, 1988, a different grand jury in the same district returned Indictment No. 88-21 against Jay, charging him in Count One with conspiracy to possess cocaine with intent to distribute and to distribute cocaine in the Western District of North Carolina and elsewhere from 1978 to 1984 and in Counts Two through Fifteen with seven episodes of possession with intent to distribute and distribution of cocaine in 1983.

Prior to trial, petitioner moved to dismiss the skeletal one-count CCE indictment, No. 88-20, on the grounds that it failed to provide him with notice of the specific transactions alleged to comprise the "continuing series" element of the CCE offense, in violation of the Sixth Amendment to the United States Constitution, and that the generic nature of the indictment failed to adequately safeguard his Fifth Amendment right to be tried only for offenses presented to and charged by the grand jury. Jay also filed motions seeking bills of particulars specifying, *inter alia*, the identity of the five or more persons he allegedly supervised, organized, or managed, and the acts and transactions upon which the government intended to rely for proof of the "continuing series" element of the CCE offense. As to the latter, the particulars supplied by the government announced its intention to rely upon the substantive counts charged in Indictment No. 88-21 to constitute the predicate offense element of the CCE offense and upon all the offenses charged in No. 88-21 to constitute the remaining elements of the CCE offense.[1]

The district court judge denied the motion to dismiss, adopting and affirming the magistrate's Memorandum and Recommendation, which concluded that the face of the indictment, along with the usual policy of open file discovery practiced in

[1] The government also stated its intention to rely generally upon five categories of uncharged conduct, along with any prior convictions of Jay for Title 21 violations, to prove the elements of the CCE offense other than the predicate offense.

the district and the consolidation of No. 88-21 for trial with No. 88-20, provided Jay with sufficient detail as to the nature of the charges against him. Neither the magistrate nor the district judge addressed Jay's separate and coequal argument directed to the Fifth Amendment grand jury guarantee.

The case was tried before Hon. Robert D. Potter and a jury on August 1-4, 1988. In timely fashion, Jay filed the following request for instruction:

> The second element the government must prove beyond a reasonable doubt is that this offense was part of a continuing series of violations of the federal narcotics laws. A continuing series of violations is three or more violations of the federal narcotics laws committed over a definite period of time.
>
> You must unanimously agree on which three acts constitute the continuing series of violations.

He also requested that the court require the jury to return a special verdict:

> The Defendant requests of the Court that special verdicts from the jury be required; to wit, that the jury must unanimously agree beyond a reasonable doubt with respect to the five persons whom the accused organized, supervised and managed, and that the jury must unanimously agree beyond a reasonable doubt as to the three predicate violations which it finds to be a series. Therefore, the jury should be asked to answer interrogatories regarding which three offenses satisfy the continuing series element of the crime charged, and regarding which five persons the accused organized, supervised and managed.

The district judge denied both requests.

On August 4, 1988, the jury returned a verdict of guilty on all counts. The defendant was sentenced to life imprisonment without parole on No. 88-20 and on No. 88-21 to consecutive sentences totalling 115 years,[2] to be served concurrently with the sentence imposed on No. 88-20.

On appeal, petitioner argued (1) that a one-count CCE indictment couched only in the generic statutory language of § 848 was insufficient to safeguard his Fifth Amendment guarantee that he be tried only upon charges duly returned by a grand jury, as it failed to provide any indicia whatsoever as to the offenses found by the grand jury to comprise the "continuing series" which defines the CCE offense charged; (2) that the proof at trial of this case constituted an impermissible constructive amendment of the indictment in violation of the Fifth Amendment, in that offenses relied upon by the government to prove the CCE predicate offense and the continuing series were only subsequently charged by a different grand jury than that which returned the CCE indictment under circumstances which at least strongly suggest that those violations had not been presented to the initial grand jury, resulting in petitioner's conviction of a different CCE offense than that defined by the evidence before the CCE grand jury, and (3) that the district judge erred in refusing to instruct the jury that in order to convict Jay on the CCE count, they must agree unanimously upon the three offenses which they found comprised the continuing criminal enterprise.[3]

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[2] On appeal, because it upheld the CCE conviction, the Fourth Circuit Court of Appeals vacated the ten year sentence imposed upon the conspiracy conviction. App. 9a.

[3] Jay also raised issues relating to the sufficiency of the evidence as to the substantive counts of No. 88-21, and the propriety of venue in the Western District of North Carolina as to those counts, the sufficiency of the evidence to support the CCE conviction, whether proof of multiple conspiracies had created a prejudicial variance, and whether the sentence of life imprisonment

On appeal, the Fourth Circuit Court of Appeals, while adverting in passing to the Fifth Amendment grand jury guarantee, predicated its holding on the notice clause of the Sixth Amendment, concluding that the face of the indictment, as supplemented by the bills of particulars furnished by the government, provided Jay with adequate notice of the charges against him, and also relying upon Fourth Circuit precedent upholding CCE counts which merely track the language of § 848. The Court rejected defendant's contention that there had been a constructive amendment of the indictment, reasoning that because the proof at trial corresponded to the specifications contained in the bill of particulars, Jay had in fact been convicted of the CCE count set forth in the indictment. Finally, the Court declined to require a unanimous jury verdict as to the violations comprising the continuing series.

Reasons Why the Writ Should Be Granted.

While questions regarding the sufficiency of CCE counts which merely track the generic language of § 848 have arisen with some frequency in the circuit courts of appeal in recent years, there has emerged no consensus among the circuits as to either the appropriate analytical framework or the resolution of the question. Some circuits have dismissed this substantial question, virtually without discussion, through rote reliance upon the general principle which holds indictments which are cast in the langauge of the statute to be sufficient to withstand vagueness or notice challenges, while other circuits have looked to whether the defendant, under the circumstances of the particular case, could be found to have had actual notice of the specific transactions alleged to constitute the continuing

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constituted cruel and unusual punishment under the Eighth Amendment, which he does not raise herein.

series. Only one circuit, the Tenth, has grappled with the relationship between the Fifth Amendment grand jury clause and the CCE count which fails to provide any indication of the offenses through which the grand jury defined the particular continuing criminal enterprise with which it had elected to charge the defendant.

While recognizing two important guarantees of the Fifth Amendment grand jury clause and the Sixth Amendment notice clause, those of adequate notice of the charges to enable the defendant to prepare his defense and of protection from being twice placed in jeopardy for the same offense, the opinion of the Fourth Circuit in this case ignored a third, and coequal, guarantee which lies at the heart of the issue advanced by petitioner on appeal and which is the central question presented in this petition for certiorari: the right to be tried only on charges duly returned by a grand jury. The fundamental defect of a one-count CCE indictment reciting only the generic language of § 848 is that it fails to safeguard a defendant from conviction "on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell* v. *United States*, 369 U.S. 749, 770 (1962). This consideration assumes pivotal significance in a case such as this in which one grand jury returned the skeletal one-count CCE indictment and an entirely different grand jury subsequently returned another indictment charging petitioner with the offenses relied upon by the government to prove the continuing criminal enterprise. Such a generic one-count indictment provides no safeguard against the potential that a grand jury may find an indictment based upon evidence of offenses A, B, C, and D and the proof at trial relate to offenses D, E, F, and G. Where such an eventuality comes to pass, and petitioner contends that it did so here, the defendant has not been fairly tried and convicted for the offense charged by the grand jury but rather for a different continuing series, perhaps encompassing different individuals allegedly organized, super-

vised, or managed, which defines a different continuing criminal enterprise than that contemplated by the grand jury.

I. The Decision of the Fourth Circuit Court of Appeals as to the Constitutional Sufficiency of a Skeletal CCE Count Which Merely Tracks the General Language of 21 U.S.C. § 848 Irreconcilably Conflicts with the Decisions of This Court in *Russell* v. *United States* and *Stirone* v. *United States*.

From its very outset, this § 848 prosecution has been characterized by a continuing and serious disregard for one of the most fundamental constitutional tenets of our system of criminal justice, the right of a criminal defendant to be tried and convicted only upon charges contained in the presentment of a duly constituted grand jury. The single-count bare bones § 848 indictment in this case, returned by a different grand jury than that which subsequently charged the offenses upon which the government relied at trial for proof of the continuing series element of the CCE offense, gave the government carte blanche to define the enterprise charged, without the constitutionally mandated check imposed by being limited to the offense actually charged by the grand jury, of which opportunity it widely availed itself both in its bill of particulars and at trial. Petitioner stands convicted and sentenced to life imprisonment without parole based not upon the duly presented charges contained in the grand jury's indictment but rather upon the prosecutor's formulation of the enterprise to suit the evidence as it emerged at trial, a result which squarely contravenes the teaching of this Court in *Russell* v. *United States*, 369 U.S. 749 (1962).

The fundamental error of the decision in this case lies in its utter failure to recognize that the Fifth Amendment grand jury clause serves a quite distinct function and protects quite different interests than either the notice or double jeopardy components of the Fifth and Sixth Amendments and, in fact, erects a third, and coequal, guarantee which mandates a different analysis governed by different considerations, as this Court clearly articulated in *Russell*:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to the grand jury which indicted him.
>
> [18] This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. . . . "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed. * * * Any other doctrine would place the rights of the citizen, which were intended

> to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." *Ex parte Bain*, [121 U.S. 1, 10, 13 (1887).]

Id. at 770-71. "The very purpose of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for [an offense] which the jury did not charge." *Stirone* v. *United States*, 361 U.S. 212, 218 (1960). *See United States* v. *Miller*, 471 U.S. 130, 143-44 (1985) (reaffirming *Stirone* and that portion of *Bain* that holds that a criminal defendant may not be convicted of an offense different from that alleged in the grand jury indictment).

The question before the Fourth Circuit was not solely whether Jay had fair notice of the elements of the offense and of the offenses charged, to which the Fourth Circuit limited its analysis; also presented squarely to the panel was the substantial question whether this bare bones generic indictment was sufficient to safeguard this third coequal protection of the indictment guarantee, that of ensuring that a criminal defendant is tried and convicted *only* of the offense or offenses actually charged by the grand jury and not of other conduct which might have been subsumed under the same criminal offense

label as the crime on trial had it been charged. As this Court recognized in *Russell*, this fundamental Fifth Amendment issue cannot be resolved through reflexive recourse to general rules applicable to the technical sufficiency of indictment draftsmanship, not is it any answer to respond, as did the Fourth Circuit, that the bills of particulars provided by the government notified Jay that *it intended to rely* on the substantive counts contained in the subsequent indictment to satisfy the "continuing series" element of the CCE offense. A facially deficient indictment cannot, of course, be cured by a bill of particulars. *Russell* v. *United States*, *supra* at 770. While notice, in the case of a facially sufficient indictment, may indeed be provided by a bill of particulars, the bill of particulars provides *no* guarantee that a defendant's equally fundamental constitutional right to be tried only on charges returned by the grand jury has not been transgressed. It is for the grand jury to charge through a duly returned indictment and not for the prosecutor to do so through a bill of particulars.

Such a facial cipher of an indictment not only leaves the defendant powerless to protect himself against prosecutorial amendment of the indictment but also leaves the trial court without the guidance necessary to intelligent rulings on the admissibility of evidence and, most critically, to the manner in which the jury must be instructed to ensure that their consideration of the defendant's guilt is limited to the offense charged by the grand jury. Sanctioning the return of such a barren document as this indictment essentially relegates the grand jury function to the writing of a blank check which the prosecutor can fill in at trial with facts that may not have formed the basis for the indictment, leaving the prosecutor "free to roam at large — to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell* v. *United States*, *supra* at 768.

The failure of the Fourth Circuit to appreciate the independent significance of the Fifth Amendment grand jury clause is

further reflected in its summary rejection of petitioner's contention that the proof at trial represented a constructive amendment of the indictment on the ground that the proof at trial corresponded to the information supplied by the government in its bills of particulars and that, therefore, Jay was convicted of the CCE charge set forth in the indictment. Contrary to the reasoning of the Fourth Circuit, however, the opinions of this Court in *Russell* and *Stirone* make it quite clear that whether a constructive amendment has occurred is measured not against what transactions the government says are encompassed by the charges but rather against what criminal transactions the grand jury in fact charged. A constructive amendment may arise from the specifications contained in a bill of particulars, *e.g.*, *Russell* v. *United States*, 369 U.S. at 770, as surely as it may from the proof at trial, *e.g.*, *Stirone* v. *United States*, 361 U.S. at 215-16.

Where the crime charged necessarily involves the grand jury's designation of the particular scheme, conspiracy, or enterprise which it has found from the evidence before it and which it has determined to charge, it becomes particularly important to ensure that neither the proof at trial nor the judge's instructions permit the trial jury to convict of a scheme or enterprise different from or broader than that charged by the grand jury. *See*, *e.g.*, *Stirone* v. *United States*, *supra* at 218-19. This principle assumes especially critical significance where complex and compound offenses such as CCE which span periods of many years are charged in the generic language of the statute. While the government is certainly not precluded from expanding its proof as to the predicate transactions relied upon by the grand jury, either in a bill of particulars or at trial, what it may not do through either vehicle is to change the identity or scope of the continuing criminal enterprise charged by substituting its own specification of the continuing series

alleged for that passed upon by the grand jury.[4] The Fourth Circuit's reliance upon this Court's decision in *United States* v. *Miller*, 471 U.S. 130, 140 (1985), to uphold this conviction on the ground that the proof at trial had, at most, constructively *narrowed* the indictment perhaps best epitomizes that Court's fundamental misapprehension of the protection afforded by the Fifth Amendment grand jury clause, for the proof at trial can only be said to have narrowed the offense charged within the meaning of *Miller* if it is the case that the return of an indictment charging a continuing criminal enterprise spanning a designated period of time permits the government at trial to introduce evidence of any and all Title 21 violations in which the government believes that a defendant was involved within the applicable time period, regardless of whether any evidence relative to those transactions was presented to the grand jury or whether it is within the scope of the continuing criminal enterprise defined by the evidence considered by the grand jury. Such a result is in fundamental conflict with the teaching of this Court in *Russell*, *Stirone*, and *Miller*.

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[4] The circumstances of this particular case demonstrate a compelling likelihood that petitioner was convicted of an offense not charged by the grand jury which returned the one-count CCE indictment. The proof at trial showed only two groups of transactions within the statute of limitations — the substantive offenses charged in Counts 2-15 of the subsequent indictment and certain uncharged Maryland transactions in 1983-84 — neither of which in all likelihood was presented to the CCE grand jury. The sole trial testimony regarding the 1983-84 Maryland transactions came from a witness who was indicted along with Jay in the subsequent indictment (No. 88-21) and who did not begin to cooperate with the government until some time after the return of that indictment and was, therefore, rather clearly not a witness before the CCE grand jury. Moreover, that No. 88-21 was not returned until more than a month after the CCE indictment would at least strongly suggest that the CCE grand jury did not have before it sufficient evidence to support the return of an indictment for the offenses alleged in the substantive counts of No. 88-21. The Fourth Circuit's misapprehension of the nature of the protection afforded by the Fifth Amendment grand jury clause led it to reject petitioner's straightforward, and correct, suggestion that resolution of his constructive amendment contention required that the Court review the minutes of the grand jury which returned the CCE indictment to determine just what transactions had been presented to the grand jury.

As discussed more fully in the next section of this petition, the Fourth Circuit is not alone in its failure to recognize that the independent operation of the grand jury clause, as interpreted through the decisions of this Court, precludes rote reliance upon general rules regarding technical pleading requirements or even upon fair or even actual notice considerations. Given the prevalence of CCE prosecutions and the frequency with which this and related issues have arisen in the various Courts of Appeals, it is of critical importance that this Court intercede and provide the guidance essential to the uniform resolution of this substantial constitutional question.

II. The Question of the Fifth and Sixth Amendment Sufficiency of a CCE Count which Merely Tracks the Language of the Statute Has Generated a Split Among the Circuits as to Both the Appropriate Analytical Framework and the Resolution of the Question Itself.

The question of the Fifth and Sixth Amendment sufficiency of a CCE count which merely recites the generic language of the statute, without specification of the offenses upon which the grand jury predicated its formulation of the continuing criminal enterprise charged, has in recent years been confronted by virtually every circuit court of appeals in the nation, with varying degrees of attention to the critical and substantial constitutional issues inherent in the deceptively straightforward question presented. A number of circuits, in what are generally the earliest cases to consider the issue, decided in the fledgling years of § 848, summarily rejected such claims through invocation of the general rule which suffices to uphold criminal charges drawn in the language of the applicable statute, without

consideration, or even so much as acknowledgment, of the grave constitutional difficulties created by the application of the general rule to a complex and compound offense such as the continuing criminal enterprise which may span a period of many years and which depends for its very definition upon the precise concatenation of its component parts, the predicate offense, the series offenses, the persons organized, supervised, or managed, and the derivation of substantial resources. *See, e.g., United States* v. *Sperling*, 506 F.2d 1323, 1344 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975) (claim that indictment legally deficient labelled "little short of fatuous"; CCE count tracked statutory language, alleging every essential element of the offense, and therefore was sufficient to provide adequate notice); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982) (argument "need not long detain us"; "[t]he indictment, phrased in the statutory terminology, sufficed"); *United States* v. *Johnson*, 575 F.2d 1347, 1356 (5th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979) (indictment sufficient because it charged in the words of the statute that defendant had engaged in a continuing criminal enterprise); *United States* v. *Sterling*, 742 F.2d 521, 526 (9th Cir. 1984) ("there is no legal requirement that the violations which make up the continuing series be specifically listed in the indictment").

While those circuits which first considered the sufficiency of a CCE count which did not specify the underlying series predicates in the early days of the development of CCE jurisprudence have generally continued to adhere to such a rigid and outcome-determinative formulation,[5] those circuits which

[5] Ironically, the one exception to such fixity of analysis may be the Fourth Circuit, which recognized in *United States* v. *Butler*, 885 F.2d 195, 198-99 (4th Cir. 1989), that the "better practice" would be to allege the specific facts which, if proved, would satisfy the elements of the CCE offense; the court held, however, that it was not error to deny defendant's motion for a bill of

have first confronted the issue in later years have eschewed rote reliance upon the statutory sufficiency of the CCE count in favor of a more open inquiry as to whether, under the circumstances of the particular case, the defendant could be found to have had constitutionally adequate actual notice of the offense charged. *See, e.g., United States* v. *Becton*, 751 F.2d 250, 256-57 (8th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) ("As a general rule, due process requires that the indictment give defendant notice of each element of the charge against him so that he can prepare an adequate defense. However, if the defendant has actual notice of the charges, due process may be satisfied despite an inadequate indictment. In this case, other counts of the indictment gave [defendant] notice of the underlying felonies"); *United States* v. *Moya-Gomez*, 860 F.2d 706, 751-52 (7th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3221 (1989) (other counts of indictment provided actual notice of the predicate acts on which the government would rely at trial for proof of CCE count); *United States* v. *Alvarez-Moreno*, 874 F.2d 1402, 1411 (11th Cir. 1989) (actual notice provided by other counts of indictment, including overt acts alleged).

Only one circuit, the Tenth, has both recognized and sought to grapple with, the substantial Fifth Amendment grand jury clause implications of a bare bones CCE count cast in the generic

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particulars because the CCE count explicitly incorporated by reference various other counts in the indictment as the charged predicate offenses, supplying actual notice of the offence charged. *See also United States* v. *Amend*, 791 F.2d 1120, 1125 (4th Cir.), *cert. denied*, 479 U.S. 930 (1986) (government's "open file" discovery policy provided actual notice). The willingness of the Fourth Circuit to look to whether the defendant had constitutionally adequate notice of the offences charged is in fact reflected in its opinion in this case; however, what the Fourth Circuit failed to recognize is that while the government's bills of particulars may indeed have provided notice of the predicate offenses upon which *the government* intended to rely at trial, they provided absolutely no assurance that those predicate offenses were encompassed within the continuing criminal enterprise charged by *the grand jury*.

terms of the statute, in two opinions which not only elaborated upon the conflict among the circuits which had developed prior to those decisions but also starkly intensified the conflict by adding a third, and constitutionally mandated, level of analysis, one directed to the requisites of the Fifth Amendment grand jury clause in the context of compound offenses comprised of multiple predicates. *See*, *e.g.*, *United States* v. *Staggs*, 881 F.2d 1527 (10th Cir. 1989) (*en banc*), *petition for cert. filed*, 46 Cr.L.Rep. 3064 (Nov. 1, 1989); *United States* v. *Rivera*, 837 F.2d 906 (10th Cir. 1988), *vacated* 874 F.2d 754 (10th Cir. 1989) (en banc).[6] In *United States* v. *Rivera*, *supra*, in which only two potential predicate violations were alleged in the other counts of the same indictment and in which there was no indication that evidence relating to a third alleged predicate had been presented to the grand jury, a panel of the Tenth Circuit held that

> if the prosecutor plans to use offenses not separately charged *in the same indictment*, he or she must present those particular facts to the grand jury, thus satisfying fifth amendment concerns, and must aver those facts in the indictment so as to satisfy sixth amendment and due process notice requirements. In the case of uncharged offenses, the words of the CCE statute alone are not sufficient to put the defendant on notice of the criminal transactions he must be prepared to meet. If the continuing series element

[6] Separate and distinct considerations arising from the Fifth Amendment grand jury clause were also addressed by Judge Clark in his special concurrence in *United States* v. *Alvarez-Moreno*, *supra* at 1416, in which he concurred with the majority because he found himself satisfied both that the defendant in that case had had actual notice and that evidence of the transactions relied upon by the government at trial had in fact been presented to the grand jury which returned the indictment.

> is not further defined in the indictment beyond the statutory language, the defendant may presume that the proof of the continuing series element will be that proof alleged in the other counts of the indictment. . . . If, however, the Government then attempts to admit evidence of uncharged felony violations of which defendant had no notice and which was not submitted to the grand jury as the supporting evidence for the continuing-series element, the trial court should disallow the evidence.

Id. at 920-21 (emphasis added). Upon rehearing *en banc*, the Court ordered supplemental briefing directed to the question whether it "[i]s sufficient for an indictment that charges a violation of 21 U.S.C. § 848 simply to allege in the language of the statute 'a continuing series of violations,' or do the 5th and 6th Amendments of the United States Constitution (including the right to indictment clause of the 5th Amendment) require the indictment to describe the essential facts constituting each violation relied upon to establish the series of violations?" The *en banc* court was equally divided on this question and on the question whether evidence of uncharged offenses could be used to prove the requisite predicate offenses, resulting in the affirmance of the trial court by an equally divided court. So important, however, does the Tenth Circuit view this Fifth Amendment grand jury clause issue that it voted *sua sponte* to revisit this issue *en banc* in *United States* v. *Staggs*, 881 F.2d 1527 (10th Cir. 1989), defining the issue for *en banc* consideration as "[w]hether a continuing criminal enterprise indictment which tracks the language of the statute and contains three violations underlying the series in another count of the indictment is sufficient to charge a continuing criminal enterprise offense under 21 U.S.C. § 848, consistent with the require-

ments for an indictment under the fifth and sixth amendments of the Constitution." While the *en banc* court remained equally divided on the issue of whether tracking the language of the statute with regard to the continuing series of violations element was sufficient to meet the constitutional requirements of an indictment, a majority of the Court held that a CCE indictment is sufficient if the CCE count charges the defendant in the language of the statute *and* other counts in the indictment allege at least three Title 21 violations, thus providing the requisite assurance that evidence relating to the series predicates relied upon by the government at trial was considered by the grand jury that returned the indictment.[7]

The opinion of the Fourth Circuit Court of Appeals in this case stands in sharp contrast to those of the Tenth Circuit in *Rivera* and *Staggs*, a decisive conflict which has its roots in the earlier jurisprudence regarding the sufficiency of CCE indictments, a body of case law which until *Rivera* and *Staggs* had uniformly failed or refused to recognize that the independent significance of the Fifth Amendment grand jury clause, as explicated by this Court in *Russell* and *Stirone*, mandated a

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[7] The paradigmatic § 848 indictment charges not only a § 848 offense but also a number of other conspiracy or substantive violations of Title 21, such as to in fact provide actual notice of the parameters and particulars of the continuing criminal enterprise charged. *See, e.g., United States* v. *Amend*, 791 F.2d 1120 (4th Cir. 1986) (indictment charged 2 conspiracy and 6 substantive counts in addition to CCE); *United States* v. *Lurz*, 666 F.2d 69 (4th Cir. 1981) (indictment alleged conspiracy count naming 23 persons and overt acts in addition to CCE count); *United States* v. *Becton*, 751 F.2d 250 (8th Cir. 1984) (other counts of indictment, along with overt acts in conspiracy count, gave adequate notice of § 848 predicates relied on); *United States* v. *Johnson*, 575 F.2d 1347 (5th Cir. 1978) (conspiracy and 3 substantive counts in addition to CCE); *United States* v. *Young*, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985) (CCE count incorporated by reference 17 overt acts in conspiracy count); *United States* v. *Sterling*, 742 F.2d 521 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (2 conspiracy, 3 substantive counts in addition to CCE); *United States* v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (defendant charged with Title 21 violations in 6 counts of indictment in addition to CCE count).

different focus of inquiry. Neither routine recourse to general principles regarding forms of pleading nor simple examinations of considerations pertaining to fair notice suffice to address the question raised in this case, and in *Rivera* and *Staggs* — whether a generic bare bones CCE count which fails to specify the predicate offenses charged to satisfy the continuing series element of the CCE offense, especially where there is no extrinsic indication that the violations relied upon by the government were presented to the grand jury which returned the CCE indictment, is sufficient to safeguard a criminal defendant's fundamental Fifth Amendment right to be tried and convicted only upon offenses charged by a duly constituted grand jury. Petitioner herein submits that it manifestly is not. This Court should grant certiorari to resolve the analytical conflict among the Circuits as exemplified by the conflict between the opinion of the Fourth Circuit in this case and those of the Tenth Circuit in *Rivera* and *Staggs*.

III. There is a Conflict Among the Circuits Relative to the Question Whether the Jury in a CCE Case Must Be Instructed that Their Verdict Must Be Unanimous as to the Three or More Predicate Violations Which Comprise the Continuing Series.

A corollary of the grand jury guarantee is that the jurors must unanimously agree that the defendant committed the particular offense charged by the grand jury and no other. *See, e.g., United States* v. *Mastelotto*, 717 F.2d 1238, 1248 (9th Cir. 1983). A federal criminal defendant has a right to be convicted only by a unanimous jury, independently guaranteed by Art. III, § 2, of the United States Constitution, *id.* at 1247, and by the Sixth Amendment, *e.g., United States* v. *Gipson*,

553 F.2d 453, 456 (5th Cir. 1977); *United States* v. *Beros*, 833 F.2d 455, 461 (3d Cir. 1987). Unanimity requires more than a conclusory agreement that the defendant violated the statute in question; it also requires agreement as to the principal factual elements underlying the offense, *see*, *e.g.*, *United States* v. *Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983), as to the specific act or acts or scheme which constitute the offense, *see*, *e.g.*, *United States* v. *Beros*, *supra* at 461; *United States* v. *Mastelotto*, *supra* at 1248, as to "just what the defendant did" as a preliminary step in determining whether the defendant is guilty of the crime charged under the theory advanced by the government, *e.g.*, *United States* v. *Gipson*, *supra* at 457-58.

> When it appears . . . that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion in such a case, the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts.

United States v. *Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983). *See*, *e.g.*, *United States* v. *Payseno*, 782 F.2d 832, 836 (9th Cir. 1986); *United States* v. *Beros*, *supra* at 460, 462.

Petitioner requested that the jury be instructed that they must unanimously agree on which three acts constituted the continuing series of violations, which request was denied by the trial judge, who gave only general unanimity instructions. The complexity of the § 848 charge in general and the evidence in this case in particular demand such a specific unanimity instruction as to the series violations. The Third Circuit, in the first reported

decision to address this question, so held in *United States* v. *Echeverri*, 854 F.2d 638 (3d Cir. 1988), concluding that a general unanimity instruction fails to provide satisfactory assurance of the requisite unanimity:

> The usual rule that a general unanimity instruction is sufficient gives way "where the complexity of the case, or other factors, creates the potential that the jury will be confused." *Beros*, 833 F.2d at 460. In this case the "complexity . . . [and] other factors" are obvious. First, there was evidence tending to show numerous alleged violations, any three of which could have been the focus of a particular juror. Since the indictment did not specify the violations that allegedly constituted the "continuing series," it offered no aid in focusing the jury's attention on particular violations.

Id. at 643. In sharp contrast to the reasoned analysis afforded the issue by the Third Circuit, the Fourth Circuit in this case rejected petitioner's contention in a dismissive one-sentence footnote, alluding to *Echeverri* but relying upon decisions of the First and Seventh Circuits in *United States* v. *Bond*, 847 F.2d 1233, 1237 (7th Cir. 1988), and *United States* v. *Tarvers*, 833 F.2d 1068, 1074 (1st Cir. 1987), which addressed only the question of jury unanimity on the identity of the five or more persons which the jury found were supervised, organized, or managed by the CCE defendant and did not consider the question raised herein, a quite different question, as the Third Circuit recognized in a post-*Echeverri* case considering the five or more persons unanimity issue:

> As the First and Seventh Circuits explained in *Tarvers* and *Markowski*, the five or more persons

> requirements of a CCE offense simply defines the size of the enterprise. This establishes that the organization in which the defendant played a leadership role was sufficiently large to warrant the enhanced punishment provided by the CCE statute. . . . While the jury must reach a consensus on the fact that there were five or more underlings, which is an essential element of the CCE offense, there is no logical reason why there must be unanimity on the identities of these underlings. Unlike the three offenses necessary to constitute a series, which is the conduct which the CCE statute is designed to punish and deter, the identity of these underlings is peripheral to the statute's other primary concern, which is the defendant's exercise of the requisite degree of supervisory authority over a sizeable enterprise.
>
> The failure to give a specific unanimity charge in *Beros* and *Echeverri* left open the possibility that those named defendants could have been convicted without substantial agreement by the jurors as to what criminal acts they performed. In contrast, precise details such as the identities of the underlings are not an essential element of the CCE offense but merely historical facts as to which the jurors could have disagreed without undermining their substantial agreement as to the ultimate and essential fact of whether the requisite size and level of control existed. We therefore conclude that *Echeverri* does not require unanimity as to the identities of the underlings in a CCE charge.

United States v. *Jackson*, 879 F.2d 85, 88-89 (3d Cir. 1989). Whether the jury must be instructed that their verdict must be unanimous as to the three violations comprising the continuing series is, therefore, a distinct question governed by entirely

different considerations than those applicable to the five person element, and the opinion of the Fourth Circuit in this case does not, as it suggests, ally the Fourth Circuit with the majority view of the issue but rather, without discussion or analysis, creates a diametric split between the Third and the Fourth Circuits, the only two courts of appeals which have decided this issue to date.[8]

The task confronting the jury is to determine whether the evidence shows at least three or more predicate violations of the narcotics laws, each of which is part of a single series committed in concert with five or more persons. It is this conjunction of all the § 848 elements in a single in concert series that is the basis for the imposition of the severe sanctions carried by the statute, and the jury must be carefully instructed regarding the requisite congruence of the elements. *See United States* v. *Gilley*, 836 F.2d 1206, 1212 (9th Cir. 1988). Jury unanimity as to the predicates relied upon is essential to ensure that the jurors have in fact all agreed that the defendant is guilty of the *same* continuing criminal enterprise, as changing the series offenses may work a substantial change in the enterprise in a way which changing the identity of the subsidiary actors does not.

Unlike the five or more supervisee element, a defendant *is* deprived of his fundamental right to be convicted of the offense charged in the indictment only by unanimous concurrence of all the jurors where the jury is not instructed that they must unanimously agree upon the three or more predicates found to comprise the series. In the absence of such an instruction, a defendant may be improperly convicted where certain jurors

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[8] The Ninth Circuit recently addressed this issue in *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989). Although finding it unnecessary to decide the issue, the Court's discussion strongly suggests that it will follow *Echeverri* when decision becomes necessary and indeed, it explicitly announced that the "better practice" would be to give a specific unanimity instruction as to the three predicate violations constituting the series. *Id.* at 1572-73.

find series A, B, C, while other jurors find series C, D, E, and yet other jurors find series X, Y, Z, each of which composites may define an entirely different continuing enterprise.

Where, as here, the offense charged is an inherently complex crime with many elements that can produce jury confusion, where the evidence was complex and encompassed, in the words of the government at trial, "hundreds" of potential predicates covering a significant time span, where the probative force of the evidence with respect to individual predicate offenses varied greatly, where the evidence did not unequivocally eliminate the possibility of juror confusion or disagreement with respect to the defendant's commission of individual predicate offenses, and where the judge's other instructions suggested that unanimity was not required as to the series offenses but only as to the felony violation, general unanimity instructions do not suffice. *See United States* v. *Gilley*, *supra*.

The unanimity of the verdicts on Counts 2-15 of No. 88-21 fails to provide sufficient guarantee that the violations of which defendant was convicted in fact constituted the "series" in which the jury found that the defendant occupied a position of organization, supervision, or management. In light of the defendant's limited role in these transactions, which was at most as the supplier of the cocaine, and the trial judge's instructions to the jury that such a role without more did not constitute a basis for finding that the supplier supervised, organized, or managed his buyer or his buyer's buyer, it cannot be said with any confidence that the jury *must* have relied upon Counts 2-15 to constitute the series. Under the circumstances of this case, it is only too likely, given the government's repeated exhortations as to the hundreds of potential predicates and the judge's instructions which permitted the jury to look to uncharged offenses as potential series violations that the jury did not in fact agree unanimously upon the particular transactions comprising the series.

The question of the unanimity requirement as to the underlying series predicates goes to the heart of the nature of the CCE offense and its prosecution. Its eventual consideration by every circuit is a certainty, yet there is already a conflict between two circuits in the first two cases to decide the issue. This Court should grant certiorari to resolve the conflict between the Third and the Fourth Circuits and to provide the requisite guidance for future CCE prosecutions, of which there are an ever-increasing number.

Conclusion.

For all the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix.

United States Court of Appeals
For the Fourth Circuit

No. 88-5635

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE

v.

JUSTO ENRIQUE JAY
DEFENDANT-APPELLANT

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Chief District Judge. (CR-88-20-C)

Argued: March 6, 1989 Decided: September 21, 1989

Before ERVIN, Chief Judge, and HALL and WILKINS, Circuit Judges.

Martin G. Weinberg (OTERI, WEINBERG & LAWSON; Bobby Lee Cook, COOK & PALMOUR: James F. Wyatt, III on brief) for Appellant. Max Oliver Cogburn, Jr., Assistant United States Attorney (Thomas J. Ashcraft, United States Attorney on brief) for Appellee.

Per Curiam. Justo Enrique Jay appeals from his convictions of one count of conspiracy to possess with intent to distribute cocaine, 14 counts of possession with intent to distribute and distribution of cocaine, and one count of operating a continuing criminal enterprise (CCE). 21 U.S.C.A. § 846 (West 1981); 21 U.S.C.A. § 841(a)(1) (West 1981); 18 U.S.C.A. § 2 (West 1969); 21 U.S.C.A. § 848 (West 1981 & Supp. 1988). Among other contentions, Jay challenges the constitutionality of the CCE indictment and the sufficiency of the evidence for his convictions. He also contends that his sentence of life imprisonment without parole violates the eighth amendment. We affirm Jay's convictions on the 14 substantive counts and on the CCE charge, but vacate his sentence on the conspiracy charge in light of our affirmance of the CCE count.

I.

Jay was indicted on February 2, 1988, in the Western District of North Carolina on the single CCE count. He was subsequently indicted in the same district by a different grand jury on March 9, 1988, for the conspiracy count and the 14 substantive counts.[1] Jay moved for a bill of particulars on the CCE and conspiracy charges and also moved to dismiss the CCE indictment for violations of the fifth and sixth amendments. The government was ordered to file two bills of particulars relating to the CCE charge, the first identifying the five individuals allegedly supervised by Jay and the second specifying the predicate offense and the series of violations intended to be relied upon by the government. In the second bill of particulars, the government stated that it would rely on the 14 substantive

[1] This indictment also contained unrelated counts which were subsequently dismissed. Jay was indicted a third time on June 8, 1988, on four additional counts of possessing cocaine with intent to distribute. This indictment was dismissed on the government's motion prior to trial.

counts charged in the March 9 indictment to establish the predicate felony violation and the series of related violations required for conviction under the CCE statute. In addition, the bill of particulars listed other alleged violations on which the government stated that it would "rely generally" to comprise the series of violations. The district court subsequently denied Jay's motion to dismiss the CCE indictment and his motion for an additional bill of particulars. Following a jury trial on the consolidated indictments, Jay was convicted on all counts. He was sentenced to life imprisonment without parole on the CCE conviction and consecutive sentences totalling 115 years on the remaining counts, to be served concurrently with the life sentence.

II.

The fifth amendment provides, in part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." U.S. Const. amend. V. The sixth amendment provides, in part, that the accused has the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. These guarantees serve two purposes. *Russell* v. *United States*, 369 U.S. 749, 763-64 (1962). First, they assure that a defendant has notice of the charges against which he must defend. To this end, an indictment must contain the elements of the offense charged and sufficiently apprise the defendant of the allegations made against him. Second, an indictment serves to protect a defendant from being twice placed in jeopardy for the same offense.

Although the February indictment charging Jay with operating a CCE tracked the language of section 848,[2] Jay contends that it violated both the fifth and the sixth amendments by failing to: (1) ensure that the grand jury was presented with sufficient evidence to support a probable cause finding of the crime for which he was tried and (2) provide adequate notice of the charges filed against him. He does not contend that he may be unable to plead double jeopardy to a future prosecution. We find that the February CCE indictment sufficiently informed Jay of the elements of the crime by following the applicable statutory provision.

This court has consistently upheld indictments which track the language of the CCE statute. *See United States* v. *Amend*, 791 F.2d 1120, 1125 (4th Cir.), *cert. denied*, 479 U.S. 930 (1986); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982). In *Amend* this court rejected an assertion similar to the one advanced by Jay that an indictment tracking the CCE statute was unconstitutionally vague by failing to specify the five individuals allegedly super-

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[2] The indictment charged:

> That from in or about the fall of 1978 and continuing thereafter up to and including the fall of 1984, in the Western District of North Carolina, and elsewhere, the defendant,
>
> JUSTO ENRIQUE JAY
>
> knowingly, wilfully and intentionally did engage in a continuing criminal enterprise, in that he violated Title 21, United States Code, Section 841, 846, 952 and 963 by doing, causing, facilitating, and aiding and abetting the importation, possession with intent to distribute, and distribution of cocaine, a Schedule II narcotic controlled substance, and which violations were a part of a continuing series of violations undertaken by defendant, JUSTO ENRIQUE JAY, in concert with at least five other persons with respect to whom defendant, JUSTO ENRIQUE JAY, occupied a position of organizer, a supervisory position, and position of management, and from which defendant, JUSTO ENRIQUE JAY, obtained substantial income and resources in violation of Title 21, United States Code, Section 848.

vised. The court in *Amend* also upheld the district court denial of a bill of particulars, noting that the defendant was supplied with sufficient information through the government's open file policy.

Although the government did not employ an open file policy here, Jay received adequate notice of the charges against him. Where an indictment sufficiently apprises a defendant of the elements of the offense for which he is charged, a bill of particulars may serve to provide the evidentiary details. *United States* v. *American Waste Fibers Co.*, 809 F.2d 1044, 1047 (4th Cir. 1987). Jay was furnished with two bills of particulars which informed him of the five persons he allegedly managed and of the predicate offenses relied upon by the government. *See United States* v. *Sperling*, 506 F.2d 1323, 1344-45 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In these bills of particulars, the government notified Jay that it intended to rely on the substantive counts charged in the subsequent indictment and other specified violations to form the basis of the series of violations necessary for a CCE conviction.

Jay also asserts that the proof at trial represented a constructive amendment of the indictment, necessitating reversal. To the contrary, the proof at trial corresponded to the information supplied by the government in the bills of particulars.

A constructive amendment of an indictment occurs when "the terms of the indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Hathaway*, 798 F.2d 902, 910 (6th Cir. 1986). In contrast, a mere variance arising from the presentation of different evidence at trial which does not alter the crime charged in the indictment normally does not affect a defendant's substantial rights. Here, Jay was convicted of the CCE charge set

forth in the indictment and, at most, this charge was constructively narrowed at trial and did not prejudice his defense. *United States* v. *Miller*, 471 U.S. 130, 140 (1985).

III.

Jay also challenges the sufficiency of the evidence on the 14 substantive counts of distribution and possession with intent to distribute cocaine, and the CCE count. Viewing the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), we find that the evidence was sufficient for a rational jury to find Jay guilty of the offenses charged.

To obtain convictions under section 841, the government was required to prove that Jay knowingly or intentionally distributed or possessed with intent to distribute a controlled substance. 21 U.S.C.A. § 841(a)(1); 18 U.S.C.A. § 2; *United States* v. *Samad*, 754 F.2d 1091, 1096 (4th Cir. 1984). The CCE conviction required proof of five elements, including that Jay committed a felony narcotics violation as part of a continuing series of three related violations.[3] 21 U.S.C.A. § 848; *Lurz*, 666 F.2d at 75; *Amend*, 791 F.2d at 1126. These violations must have been in concert with five or more persons supervised by Jay and he must have derived substantial income from these violations. *Lurz*, 666 F.2d at 75.

The evidence presented at trial established that Jay was one of the leaders of a major drug distribution network operating on the eastern coast of the United States from as early as 1979 and continuing through 1984. The government offered the

[3] We decline to adopt Jay's position that the jury is required to unanimously agree upon the violations comprising the series. *See United States* v. *Bond*, 847 F.2d 1233, 1237 (7th Cir. 1988); *United States* v. *Tarvers*, 833 F.2d 1068, 1074 (1st Cir. 1987); *but see United States* v. *Echeverri*, 854 F.2d 638 (3d Cir. 1988).

testimony of several cooperating witnesses who were involved in the elaborate operation. Prior to Jay's trial, at least two of these individuals had entered guilty pleas to operating continuing criminal enterprises. The testimony of these witnesses demonstrates that Jay, along with his partner Fernando Lopez, supplied these witnesses and others with cocaine in Miami, Florida for transportation to Charlotte, North Carolina and other areas on the east coast.

While much of the evidence presented involved transactions which occurred beyond the statute of limitations,[4] when viewed in the light most favorable to the government, there was sufficient evidence upon which the jury could have found Jay guilty of substantive acts committed within the statute of limitations period. The jury was carefully instructed that it could not find Jay guilty of the substantive counts charged unless it found "beyond a reasonable doubt that he possessed cocaine with intent to distribute or that he distributed cocaine or that he aided and abetted the possession or distribution of cocaine in the Western District of North Carolina after March 9, 1983." And on the CCE charge, the jury was properly instructed that Jay must have been engaged in the continuing criminal enterprise within five years of the indictment.

IV.

Jay further contends that his sentence of life imprisonment without parole constitutes cruel and unusual punishment pursuant to the eighth amendment. U.S. Const. amend. VIII. This court held in *United States* v. *Rhodes*, 779 F.2d 1019, 1028 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986), that a

[4] The 14 substantive counts charged in the second indictment, for which Jay was convicted, all occurred within the statute of limitations. Several of the other violations listed in the second bill of particulars and presented at trial occurred beyond the statute of limitations.

proportionality review must be conducted in all cases involving sentences of life imprisonment without parole. In *Solem* v. *Helm*, 463 U.S. 277 (1983), the Supreme Court provided a three-part test for conducting a proportionality review under the eighth amendment. Pursuant to this analysis, the court must consider "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentence imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

In determining whether the sentence imposed here is within constitutional limits, we give substantial deference to the congressional enactment of this statutory penalty and also to the sentencing court. *Id.* at 290. We also note that the Supreme Court in *Solem* asserted that successful proportionality challenges in non-capital cases would be exceedingly rare. *Id.* at 289-90.

Although we recognize that the sentence imposed upon Jay is the maximum provided by statute, we do not hesitate to conclude that the sentence is constitutional under the *Solem* analysis. The offense for which Jay was convicted was sufficiently grave to warrant a life sentence. And the life sentence is proportional to the sentences of other convicted major distributors of narcotics in this jurisdiction and in others. *See United States* v. *Porter*, 821 F.2d 968 (4th Cir. 1987), *cert. denied*, 99 L.Ed.2d 269 (1988) (75-year sentence); *United States* v. *Stewart*, 820 F.2d 1107 (9th Cir.), *cert. denied*, 98 L.Ed.2d 144 (1987) (life sentence).

V.

Jay's remaining assignments of error are without merit and need not be addressed in detail. Included in these allegations are the claims that there was insufficient evidence to establish proper venue in the Western District of North Carolina and

that the court erred in its instructions to the jury. Jay also alleges that the district court erred in allowing into evidence a driver's license which showed that Jay used an alias and connected him to property owned by his partner Lopez. His last allegation that the government prejudicially proved two conspiracies is equally without merit.

VI.

In addition to being sentenced to life imprisonment without parole on the CCE charge, Jay was also sentenced to 10 years on his conspiracy conviction. Since we affirm the CCE conviction, we vacate the conspiracy sentence. *Lurz*, 666 F.2d at 81.

AFFIRMED in part;
VACATED in part.

United States Court of Appeals
For the Fourth Circuit

No. 88-5635

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

JUSTO ENRIQUE JAY
Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Wilkins with the concurrences of Chief Justice Ervin and Judge Hall.

For the Court,

/s/ _____
Clerk